United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-6162

To be argued by
LEON ROSEN

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

LOIS HOPE SMALL and VEDA MAY POULSON
also known as GORDON,

Plaintiffs-Appellees,

—against—

MAURICE F. KILEY, District Director, United States Immigration and Naturalization Service; and

LEONARD P. CHAPMAN, Commissioner, Immigration and Naturalization Service,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES

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TABLE OF CONTENTS

Page

STATEMENT OF ISSUES.....1

PRELIMINARY STATEMENT.....2

STATEMENT OF THE CASE.....2

ARGUMENT:

POINT I - The District Court Had Subject Matter Jurisdiction Under the Administrative Procedure Act.....5

A. A deportation order was not being reviewed.....5

B. The majority of circuits have declared the Administrative Procedure Act confers jurisdiction.....6

C. The complaint presented constitutional issues and hence was a collateral civil action.....7

D. Congress has amended the A.P.A. and Federal question jurisdiction to codify the interpretations of the circuits.....8

POINT II - Alternative Jurisdictional Bases Existed for the District Court.....8

A. Jurisdiction existed under 28 U.S.C. 1331(a).....8

B. Jurisdiction existed under 28 U.S.C. 1346(2).....9

C. Exhaustion of Administrative Remedies is inapplicable on a delay question in the district courts.....9

POINT III - The Absence of Jurisdictional Averments is a Curable Defect.....11

POINT IV - The District Court Had Pendent Jurisdiction to Enjoin the Deportation Hearing.....11

A. Injunctive relief against deportation proceedings was ancillary to the complaint.....12

B. Jurisdiction under the Mandamus and Venue Act was sufficient for pendent jurisdiction.....12

C. Requirement of exhaustion of administrative remedies is discretionary.....13

D. The naturalization right of plaintiff called for the favorable exercise of pendent jurisdiction to enjoin an intimately connected deportation hearing.....14

E. Piecemeal litigation would have been the consequence of not exercising pendent jurisdiction.....14

POINT V - The District Court Made Implicit Findings of Irreparable Injury and Likelihood of Success on the Merits.....15

CONCLUSION.....16

TABLE OF AUTHORITIES

Almenares v. Wyman, 453 F.2d 1075 (2d Cir. 1971).....Page 12

American Dredging Co. v. Cochrane, 190 F.2d 106, 89 U.S. App. D.C. 88 (D.C. Cir. 1951).....9

Bard v. Seamens, 507 F.2d 765 (10th Cir. 1974).....6

Birsch v. Hirsch, 331 F.2d 251 (7th Cir. 1964).....15

Bradley v. Weinberger, 483 F.2d 410 (1st Cir. 1973).....6

Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970).....6

Burnett v. Tolson, 474 F.2d 877 (4th Cir. 1973).....9

Chang Fan Kwok v. INS, 392 U.S. 206 (1968).....5

Chase Manhattan Mortgage and Realty Trust, Boston, Massachusetts v. Pendley, 405 F. Supp. 593 (Ga. D. Ct. 1975).....11

City Federal Savings and Loan Ass. v. Crowley, 393 F. Supp. 644 (S.D. Wis. 1975).....11

Deering v. Milliken, Inc. Johnston, 295 F.2d 856 (4th Cir. 1961).....6

Dugan v. Rank, 83 S. Ct. 999, 372 U.S. 609, 10 L.Ed.2d 15 (1963).....9

Elmore v. Hill, 345 F. Supp. 1098 (W.D. W. Va. 1972).....11

Feinberg v. Federal Deposit Ins. Corp., 420 F. Supp. 109 (D.C. D.C. 1976).....9

Finnerty v. Cowen, 508 F.2d 979 (2d Cir. 1974).....10

Gatreaux v. Romney, 448 F.2d 731 (7th Cir. 1971).....9

Glodgett v. Betit, 368 F. Supp. 211.....11

Gomez v. Wilson, 155 U.S. App. D.C. 242, 477, F.2d 411, 419, 421 (1973).....9

Hadar v. Coomey, 401 F. Supp. 717 (Mass. D. Ct. 1974).....10

Ideal Toy Corp. v. Sayco Doll Corp., 302 F.2d 623 (2d Cir. 1962).....16

Lennon v. United States, 387 F. Supp. 561 (S.D. N.Y. 1975).....7

Ludon v. Kyne, 358 U.S. 184 188-189, 79 S. Ct. 180, 183-184, 3 L.Ed. 2d 210.....13

McCulloch v. Sociedad Nacionel de Marineros de Honduras, 372 U.S. 10, 83 S. Ct. 671, 9 L.Ed.2d 547 (1963).....13

McGaw v. Farrow, 472 F.2d 952 (4th Cir. 1973).....9

N.L.R.B. v. Industrial Union of Marine and Shipbuilding Workers of America, AFL CIO Local 22, N.J., 88 S. Ct. 1717, 391 U.S. 418, 20 L.Ed.2d 706 (1968).....10

Nippon Exp. U.S.A., Inc. v. Experdy, 261 F. Supp. 561 (D.C. N.Y. 1966).....10

Olijato Chapter of Navajo Tribe v. Train, 515 F.2d 654 (D.C. Cir 1975).....6

Philbrook v. Glodgett, 95 S. Ct. 1893, 421 U.S. 707, 44 L.Ed.2d 525 1975.....11

Pickus v. U.S. Bd. of Parole, 507 F.2d 1107 (D.C. Cir. 1974).....6

Rosada v. Wyman, 397 U.S. 397, 405, S. Ct. 1207 (1970).....12

Roselli v. Affleck, 508 F.2d 1277 (1st Cir. 1974).....16

Rowley v. McMillan, 502 F.2d 1326 (4th Cir. 1974).....9, 15

Rusk v. Cort, 339 U.S. 367, 82 S.Ct. 787 (1962).....6

Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).....5

State of New York v. White, 528 F.2d 336 (2d Cir. 1975).....11

Stokes v. INS, 393 F. Supp. 24 (S.D. N.Y. 1975).....7, 10

Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967).....6

United Mine Workers v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130 (1966).....11

U.S. ex rel Marrero v. Warden, Lewisburg Penitentiary, 483 F.2d 656 (3rd Cir. 1973).....10

Urbain v. Knoff Bros. Mfg. Co., 217 F.2d 810 (Ohio 1954) 75 S. Ct. 772, 349 U.S. 930 99 L.Ed. 1260.....15

Young v. United States, 498 F.2d 1211 (5th Cir. 1974).....6

Youngstown Sheet & Tub Co. v. Lawyer, 103 F. Supp. 569, aff'd 343 U.S. 579 72 S. Ct. 863 (1952).....16

Zimmerman v. U.S. Government, 422 F.2d 326 (3rd Cir. 1970).....6

FEDERAL STATUTES

page

5 U.S.C. 702 et seq.....2,5,8

8 U.S.C. 1105(a), 1105(c).....10

8 U.S.C. 1151(b).....4,14

8 U.S.C. 1154.....4

8 U.S.C. 1329.....7

8 U.S.C. 1445, 1447.....2,14

8 U.S.C. 1446.....14

28 U.S.C. 1331(a).....2,8

28 U.S.C. 1346(a)(2).....2,8

28 U.S.C. 1361.....13

Rule 81(b) of Fed. R. Civ. Proc.....13

BILLS AND CONGRESSIONAL MATERIALS

P.L. 94-574 90 Stat. 2721, 94th Congress (October 21, 1976).....8

H.R. 94-1656, 94th Congress (1976).....8,9,12,13

OTHER AUTHORITIES

1 J. Moore, Federal Practice, Par. 0.90 at 93-94.....6

1 J. Moore, Federal Practice, Par. 0.96 at 939.....8

1 J. Moore, Federal Practice, at 828.....8

Earnest, The Jurisdictional Amount in Controversey in Suites to Enforce Federal Rights, 54 Texas L. Rev., 545, 557, 588 (1976).....9

3 Davis, Adm. Law Treatise, Ch. 20.....10, 13

UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT

LOIS HOPE SMALL
and
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Plaintiffs-Appellees,

v.

MAURICE F. KILEY, District
Director, United States
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tion Service; and
LEONARD P. CHAPMAN, Commis-
sioner, Immigration and
Naturalization Service,

Defendants-Appellants.

BRIEF FOR PLAINTIFFS-APPELLEES

Statement of Issues

(1) Does the Administrative Procedure Act confer jurisdiction on the District Courts to review actions taken by the Immigration and Naturalization Service.

(2) Are there alternative jurisdictional bases in the instant action.

(3) Is the absence of averred jurisdictional bases in the complaint a curable defect.

(4) Was there pendent or ancillary jurisdiction to enjoin the deportation proceeding.

(5) Should the grant of a preliminary injunction be affirmed because the District Court's finding of "delay" by the Immigration Service is an implicit, if not express determination of plaintiffs-appellees' likelihood of success on the merits and irreparable injury.

Preliminary Statement

This appeal is taken by the Immigration and Natrualization Service, ("INS"), defendants-appellants from a preliminary injunction order of the United States district court for the Eastern District of New York, George C. Pratt, Judge, sitting in Judge Neaher's absence, entered August 13, 1976, enjoining defendants-appellants from proceeding with the deportation proceedings respecting plaintiff Veda May Poulson. Plaintiffs-appellees contend that the district court had ancillary subject matter jurisdiction, pendent lite, to issue the preliminary injunction, in aid of the district court's jurisdiction over the federal questions[1] presented in plaintiffs-appellees' complaint, the court's jurisdiction over plaintiffs-appellees' petition for naturalization,[2] and the Administrative Procedure Act.[3] With respect to defendants-appellants alternative contention, i.e., the district court "erred in granting the preliminary injunction without first making any determination respecting plaintiffs-appellees likelihood of success on the merits or the existence of irreparable injury pendent lite," (defendants-appellants brief page 2), plaintiffs-appellees submit, the district court did make these findings, albeit implicitly in its order granting the preliminary injunction.

Statement of the Case

Plaintiff Ms. Small is a lawful permanent resident of the United States. Ms. Poulson is the mother of Ms. Small and has resided in the United States

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[1] 28 U.S.C. 1331(a) or 28 U.S.C. 1346(a)(2)

[2] Plaintiff's petition for naturalization filed on or about January 1976 pursuant to 8 U.S.C. 1445, 1447.

[3] 5 U.S.C. 702 et sequence

since 1963.[4] Plaintiff Small instituted an action for declaratory judgment on April 23, 1976, complaining of the defendant, General Leonard P. Chapman, ret. U.S.M.C., now Commissioner of the INS, that his priorities directive was in "violation of his powers, duties, and obligations under 8 U.S.C. 1103."[5] In effect, plaintiff Small complained of INS procedures implementing the said priorities of Commissioner Chapman which, by virtue of his priority campaign, would result in the likelihood of plaintiff Small being separated from her mother, Poulson, for an indeterminate time, possibly years. This would, in turn, occur because INS would shelve Ms. Small's petition for naturalization until personnel could investigate make believe inconsistencies in Small's visa application and petition for naturalization, which very materiality to issue of naturalization were vague.[6] After Ms. Small's naturalization, she would

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4 Ms. Poulson has been under "docket control" by the Service since on or about 1969 and constantly aware of her whereabouts due to an immediate relative petition filed by her husband, Mr. Poulson and approved by the Service. Individuals pursuing applications are generally given administrative required departure dates (RD) which are extended from time to time due to Service delays in processing. Appellants' footnote 1, hence, mischaracterizes the situation since her continued presence has been, until this litigation, at the acquiescence of the Service.

5 Par. 9 at A5.

6 Affidavit of Nina R. Cameron, A22 states, "In her application (Ms. Small) for a visa, she stated her mother's name was Ouida Gordon and her father's, Sydney Small." This affidavit misspells the mother's name as listed in the visa. A "u" should not follow the "O" but rather, a "v". Hence, it is not Ouida, but Ovida, a possible misinterpretation by Ms. Cameron. Second, visa applications ask for the mother's name prior to marriage. Moreover, quite frequently, mothers are also unwed as is the case at the time of Ms. Small's birth. The mother did marry Mr. Poulson, however, so that her name would now be Ovida Poulson. The nickname for Ovida is clearly Veda. (See also footnote 8). Counsel submits that overseas investigations for these problems are clear examples of the tyranny of the bureaucrat and cannot be assumed to be routine; hence evidence a scheme of conduct directed at primarily the attorney of record who presently has actions pending before Judge Lasker of the Southern District Court for monetary damages against named immigration officers for violations of 4th amendment rights against citizens and lawful residents of the United States.

submit a peition for immediate relative classification for her mother, Ms. Poulson. At this point, Ms. Small would then be required by statute to prove the relationship by birth certificates and any changes of names by marriage, and or blood tests, etc.[7] Moreover, in view of the fact that Ms. Small did not obtain her American residency through her mother there was less reason, if any, to order an investigation on this issue at the naturalization proceedings.[8] For these reasons, plaintiff prayed for relief to prevent another outstanding example of the Naturalization Section of the Service spinning its wheels as well as complaining of lack of personnel to justify delays, while the Deportation Section of the Service moved rapidly and with speed to move out the mother in a classic squeeze play. At the

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[7] I&N 201(b) and 204(a), 8 U.S.C. 1151, 8 U.S.C. 1154.

[8] Government counsel at footnote 7 of his brief cites the refusal of Ms. Small and Ms. Poulson to answer questions or produce documents and hence, investigation was required to be undertaken. The conference referred to by Government counsel occurred prior to the institution of this district court litigation. At that administrative level conference, the attorney of record, Mr. Rosen, advised Ms. Poulson not to answer any further questions from Mr. Turso, the I&N Officer, or to make a statement, evidence of which would be used to establish deportability, since the officer at the administrative level told Mr. Rosen he was instituting deportation proceedings without delay. With respect to the charge of refusal to produce documents, it is with some restraint pointed out that the government was in possession of every document it needed and had been in possession for some six years. Ms. Small's birth certificate is in her immigration file. This birth certificate indicates her mother to be Oveida May Gordon. Her father's name is Small. Her mother and father not having married, it is clear why her mother's name is not Small and why the daughter's name is Small.

Oveida May Gordon, as indicated in footnote 1 above, is now Oveida Poulson. The Service has this change of name in the mother's file since a marriage certificate accompanied the immediate relative petition filed by Mr. Poulson and shows prior names. Mrs. Poulson was unable to obtain a visa because of the public charge bar which she was unable to overcome because of her husband's unemployment. They later separated. The suggestion in the government note, of a sham marriage and possible acts of fraud are afterthoughts in deed, as well as their characterization of Ms. Poulson being in the country unlawfully, governments footnote 1, plaintiffs-appellees rebuttal footnote 4.

hearing, the district court temporarily enjoined the defendants from proceeding until twenty days after completion of deposition, but first staying the deposition until determination of the motion for dismissal.[9] Defendants-appellants filed on October 8, 1976, a Notice of Appeal from that part of the order which granted a temporary preliminary injunction enjoining the deportation proceedings.

Argument

Point I

THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION UNDER THE ADMINISTRATIVE PROCEDURE ACT.

The Complaint Did Not Seek Review of a 242(b) Deportation Order

Declaratory judgment actions under the Administrative Procedure Act may be instituted in immigration cases except when review is sought of an exclusion or deportation order. Chang Fan Kwok v. Immigration and Naturalization Service, 392 U.S. 206 (1968). 5 U.S.C. 702 et. seq. grants judicial review to "a person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute." Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970). 5 U.S.C. 704 provides in pertinent part, "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review..." The Supreme Court has stated that one who is entitled to review under the Administrative Procedure Act

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[9] Judge Pratt made these interlocutory orders since Judge Neaher, originally assigned to the case, was on vacation and hence, deferred disposition of the issues to him. His preliminary injunction until disposition of the jurisdictional argument clearly attempted to only maintain the status quo until Judge Neaher returned.

cannot be denied review on the ground that a district court lacks jurisdiction to provide it. Rusk v. Cort, 339 U.S. 367, 82 S. Ct. 787 (1962). In the instant case, review in the district court was not sought of a deportation order, but was sought against delay.[10]

The Majority of Circuits Have Declared The A.P.A. Confers Jurisdiction

Professor Lucas has canvassed the circuits and at last reading, the circuits are six to two for jurisdiction, without the necessity of a jurisdictional minimum amount.[11] Pickus v. U.S. Bd. of Parole, 507 F2d 1107 (D.C. Cir. 1974); Jackson v. Lynn, 506 F.2d 233 (D.C. Cir. 1974); Olijato Chapter of Navajo Tribe v. Train, 515 F.2d 654 (D.C. Cir. 1975); Bradley v. Weinberger, 483 F.2d 410 (1st Cir. 1973); Bard v. Seamens, 507 F.2d 765 (10th Cir. 1974); Deering v. Milliken, Inc. Johnston, 295 F.2d 856 (4th Cir. 1961); Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970); Young v. United States, 498 F.2d 1211 (5th Cir. 1974). On the other side see, Twin Cities Chippewa Tribe v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967); Zimmerman v. U. S. Government, 422 F.2d 326 (3rd Cir. 1970). Appellants-defendants contend that many of these cases fail to recognize the distinction between grants of subject matter jurisdiction and reviewability. Appellees respectfully disagree and cite the interpretation of Professor Lucas in Moore's Federal Practice.[12]

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[10] Suppose General Chapman calls a halt to all naturalization proceedings? Is the contention of the government that such actions are not reviewable?

[11] 1 J. Moore, Federal Practice, Par. 0.90, Supplement at 93-94.

[12] Ibid.

Constitutional Issues and Collateral Civil Action

In Lennon v. United States, 387 F. Supp. 561 (S.D. N.Y. 1975), at 566 the court found subject matter jurisdiction for constitutional issues when asserted in a collateral civil action. The constitutional issue in effect, posed by plaintiffs in their complaint, is whether the Commissioner is in actuality legislating and not regulating, and whether selective prosecution (see Lennon) is occurring. In Stokes v. U.S. Immigration and Naturalization Service, 393 F. Supp. 24 (S.D. N.Y. 1975) the Court said 8 U.S.C. 1329 (279 of the Act) gave jurisdiction over actions brought by citizens who had married aliens and who sought to challenge procedures employed by Immigration and Naturalization Service officers with respect to investigations in connection with citizens' applications for classification of their wives as "immediate relatives." One of the questions presented there was the enormous delays on the part of the Service in adjudicating benefits under the laws. Just as procedures were challenged in Stokes, so are the dilatory Naturalization procedures challenged in the instant case. Both immediate relative petitions and naturalization proceedings were low priority in Commissioner Chapman's priority directives and budget. It can not be doubted that if the Immigration Service had wanted to seek retribution in the Stokes case and bring deportation hearings against all beneficiaries because petitioners were suing them in the district courts, would not the district court have enjoined them pendent lite in aid of its jurisdiction? Plaintiffs submit that at least with respect to the "delay" aspect of the complaint, there is jurisdiction, and that since there is no remedy administratively with respect to delay, exhaustion is not a proper principle to invoke to a delay action.

New Amendments

The Second Circuit is said to not have resolved the issue, but the United States Congress has recently made its opinion known by amending 5 U.S.C. 702 and 703 to codify the reading of the majority of circuits. Public Law 94-574, October 21, 1976, 90 Stat. 2721, 94th Congress. (8 U.S.C. 1331(a)).

Point II

ALTERNATIVE JURISDICTIONAL BASES: 28 U.S.C. Sect. 1331(a) and 1346(a)(2)

28 U.S.C. 1331(a)

28 U.S.C. 1331(a) has been amended by the following, "except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity" Sec. 2, P.L. 94-574. The conflict in the circuits is now over. Jurisdiction can be supplied under § 1331(a) as amended, and was so construed prior to this amendment. Defendants-appellants filed their notice of appeal before the district court could rule on their motion to dismiss for want of jurisdiction. Even without the amendments above cited, the district court could have found jurisdiction under the A.P.A. or under 1331(a) with or without an allegation of jurisdictional amounts.[13]

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[13] Ibid and § 0.96 (3.1) Pg. 939. See Committee comments, U.S. Code Congressional and Administrative News No. 14, Dec. 3, 1976, Legislative History P. 6553, at page 6569 (page 16 of the report), where the committee report stated: "Elimination of the amount in controversy is not likely in itself to increase even the number of suits against Federal officers since some courts are already adopting a very lax interpretation of the requirement in such cases. But elimination of the requisite jurisdictional amount will eliminate a technical barrier to judicial relief which many courts are avoiding or circumventing altogether in order to avoid injustice. Professor Davis noted in connection with the elimination of the sovereign immunity defense in equitable actions, 'Congress should relieve our good judges from such an unnecessary dilemma.' It

(Footnote continued on next page)

28 U.S.C. 1346(2)

In Rowley v. McMillan, 502 F.2d 1326 (4th Cir. 1974), the court noted that the official immunity of federal agents from suit has no application to a suit for declaratory or injunctive relief under 1346(2) and, specifically, had no application to suit to enjoin agents from future denials of the exercise by plaintiffs of their constitutional rights. Further, that official immunity is grounded on the inhibitory effect of suits for money damages which the instant action is not. See also American Dredging Co. v. Cochrane, 190 F.2d 106, 89 U.S. App. D.C. 88 (D.C. Cir. 1951); Dugan v. Rank, 83 S. Ct. 999, 372 U.S. 609, 10 L.Ed.2d 15 (1963); and Gatreaux v. Romney, 448 F.2d 731 (7th Cir. 1971).

Exhaustion Only Required Where Remedy Adequate

With respect to the contention that there "would have been no point in so limiting the jurisdiction of the courts of appeals and district courts if the statute is construed to allow aliens to by-pass the administrative process by obtaining review prior to agency action..." this rebuttal is in order. If the doctrine of exhaustion of administrative remedies is to be invoked, the administrative process must be available and submission to that process of claim cannot be an exercise in futility. Feinberg v. Federal Deposit Ins.

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should enact S. 800 and thus eliminate the jurisdictional amount-in-controversy requirement in all Federal question cases where the suit is against the United States, any agency thereof, or any officer or employee thereof in his official capacity." See also, Earnest, the Jurisdictional Amount in Controversy in Suits to Enforce Federal Rights, 54 Texas L. Rev.; 545, 557 558 (1976). For a thorough review of the cases and commentary on this issue, see Gomez v. Wilson, 155 U.S. App. D.C. 242, 477 F.2d 411, 419; 421 (1973). Also see McGaw v. Farrow, 472 F.2d 952 (4th Cir. 1973) and Burnett v. Tolson, 474 F.2d 877 (4th Cir. 1973).

Corp., 420 F. Supp. 109 (D.C. D.C. 1976); N.L.R.B. v. Industrial Union of Marine and Shipbuilding Workers of America, AFL CIO Local 22, N.J., 88 S. Ct. 1717, 391 U.S. 418, 20 L.Ed.2d 706 (1968); U.S. ex rel. Marrero v. Warden, Lewisburg Penitentiary, 483 F.2d 656 (3rd Cir. 1973), rev. on other grounds 94 S. Ct. 2532 94 S. Ct. 865; Nippon Exp. U.S.A., Inc. v. Experdy, 261 F. Supp. 561 (D.C. N.Y. 1966); Finnerty v. Cowen, 508 F.2d 979 (2d Cir. 1974); Stokes v. U.S. Immigration and Naturalization Service, 393 F. Supp. 24 (S.D. N.Y. 1975). To press the claims of the plaintiff Small in the deportation setting of Ms. Poulson is ridiculous. The Immigration Judge would not have permitted the arguments. There is no forum at any administrative level for her contentions. See Lennon, supra, at 564-565 for an analogue of selective prosecution; also see Hadar v. Coomey.[14] Time and time again it has been repeated to litigants in both the 242(b) proceeding and an appeal to the Board of Immigration Appeals that there is no jurisdiction for them to consider any such claims. Their only concern is strict deportability. On a technical reading, the following observations can be seen:

1. 8 U.S.C. 1105(a) only address itself to "final" orders of deportation. There is no final order or any other existing of a 242(b) proceeding.
2. Exhaustion under 1105(c) only is required when in fact a deportation order exists, not the case in the instant action.
3. The district court was not being asked to determine deportability but simply to maintain the status quo.

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[14] 401 F. Supp. 717 (Mass. D. Ct. 1974). Also see 3 Davis, Adm. Law Treatise, Ch. 20.

Point III

THE ABSENCE OF A JURISDICTIONAL AVERMENT IS A CURABLE DEFECT.

A statute conferring federal jurisdiction need not be specifically pleaded if facts giving the court jurisdiction are set forth in the complaint. Glodgett v. Betit, 368 F. Supp. 211, aff. in Philbrook v. Glodgett, 95 S. Ct. 1893, 421 U.S. 707, 44 L.Ed.2d 525 1975; Elmore v. Hill, 345 F. Supp. 1098 D. Ct. Va.; City Federal Savings and Loan Association v. Crowley, 393 F. Supp. 644 (S.D. Wis. 1975). Plaintiff, if necessary, is entitled to amend the complaint to add the necessary averred jurisdictional bases. State of New York v. White, 528 F.2d 336 (2d Cir. 1975). Also see Fed. Rules Civ. Proc. 12(b)(1) 15, as construed in Chase Manhattan Mortgage and Realty Trust, Boston, Massachusetts v. Pendly, 405 F. Supp. 593 (Ga. D. Ct. 1975).

Point IV

THE DISTRICT COURT HAD PENDENT JURISDICTION TO ENJOIN THE DEPORTATION HEARING

"When a federal court has jurisdiction over the main cause of action, it also has jurisdiction over any proceedings ancillary to that action."[15] Sometimes called "pendent" jurisdiction, plaintiffs' main action sought relief against the Naturalization Section and to test whether the Commissioner of the INS had abused his delegated power. She also asked relief against the Deportation Section as ancillary to her main claim. Where the "same nucleus of operative facts exist,"[16] the court may exercise its discretionary pendent or ancillary

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[15] Moore's, page 828, main text.

[16] United Mine Workers v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130 (1966).

jurisdiction. In Almenares v. Wyman, 453 F.2d 1075, (2d Cir. 1971) cert. den 92 S. Ct. 962 405 U.S. 944, it was argued that plaintiffs, AFDC recipients, did not exhaust their state remedy. The court decided the state hearing could not remedy the evil of which plaintiff complained at 1086, and that constitutional claims do not require that similar state judicial remedies be exhausted.

Injunction Relief was Ancillary to the Complaint

The injunctive relief (Deportation proceedings) sought was ancillary to the naturalization relief and intended only to maintain the status quo. The government's contention in Point 2 of their brief that 8 U.S.C. Section 1252(b) "is the sole and exclusive procedure for determining the deportability of an alien under this Section" falls short of the issue in the instant action; the question is whether, if the district court has jurisdiction of the challenge to the Commissioner's priorities and to order mandamus if appropriate, does it have "pendent" jurisdiction[17] to preliminarily enjoin an intimately connected deportation hearing in aid of that jurisdiction without requiring the plaintiff to exhaust her remedies or allege the jurisdictional amount with respect to injunctive relief sought. Almenares v. Wyman, see supra, at page 1083.

Mandamus

With respect to mandamus relief sought by plaintiffs-appellees, see the Legislative House Report of P.L. 94-574 (see footnote 13 supra) where the Committee notes, "...the limitation can be (prior to the passage of these amendments) circumvented if the plaintiff brings his action in the

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[17] Rosada v. Wyman, 397 U.S. 397, 405, S. Ct. 1207 (1970).

District of Columbia or if he can cast his action in the form of a mandamus proceeding under 28 U.S.C. Section 1361, the Mandamus and Venue Act, at page 6568 of the Cong. and Adm. News. Appellees submit that the posture of the instant action was cast in the above mold. Rule 81(b) of the Federal Rules of Civ. Proc. (A3) and the prayer for relief of the complaint (A6).

Exhaustion is Discretionary

In McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 83 S. Ct. 671, 9 L.Ed.2d 547 (1963), Professor Davis notes, "the Court allowed a suit in the district court to enjoin the regional director of the NLRB from holding a representation election. The court said nothing of 'exclusive jurisdiction' in the court of appeals, and it said nothing of the long settled rule of judicial administration. The approach of this opinion, saying between the lines that a court has a discretionary power to require exhaustion or not, is much to be preferred to the absolute and rigid approach of the Myles opinion."[18] In the same vein, Professor Davis discusses Ludon v. Kyne, 358 U.S. 184 188-189 79 S. Ct. 180, 183-184, 3 L.Ed.2d 210, where the Supreme Court held, "The sole and narrow question presented is whether a Federal District Court has jurisdiction of an original suit to vacate a determination of the Board because made in excess of its powers. We think the answer surely must be yes. This suit is not one to 'review', in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act... Plainly, this was an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a 'right' assured to them

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[18] Davis, Administrative Law Treatise, Ch. 20, "Exhaustion of Remedies," § 20.02 at page 23.

by Congress. Surely, in these circumstances a Federal District court has jurisdiction of an original suit to prevent deprivation of a right so given."

Naturalization Rights

As the professional employee right is assured and original suit allowed to prevent deprivation of that right, so is the right of a lawful permanent resident applying for naturalization, to have her petition acted on in the district courts.[19] The function of the Naturalization examiner is only to make recommendations.[20] The right of naturalization is one of the most precious rights bestowed upon immigrants in the 14th amendment of the U.S. Constitution and nationality statutes. The rights attendant upon naturalization are most precious in the immigration context, for these include the cloak of immunity from deportation and the statutory privileges of reunifying with one's "immediate relative."[21] It is this latter privilege which makes the priority program of the commissioner with respect to naturalization so intimately connected with the deportation aspect of the instant case and calls for the application of pendent jurisdiction in the court's discretion to excuse exhaustion and prevent the deportation squeeze by INS in bad faith and harrassment.

Piecemeal Litigation is Exhausting

Counsel submits that if there is jurisdiction to press the mandamus issue and challenge the priority program in the district court, but to require

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19 8 U.S.C. 1445, 1447.

20 8 U.S.C. 1446.

21 8 U.S.C. 1151(b).

exhaustion of remedies and continue with deportation hearings, that this is the type of multifarious litigation which is exhausting to all but the most wealthiest of aliens. The government would have Ms. Poulson pursue suspension of deportation and appeals through BIA and Court of Appeals. Each request for relief involves a separate and distinct fee higher than the fees for litigation in the federal courts and innumerous applications. The emotional trauma of a deportation hearing for the 58 year old mother is unquestionably both immediate and irreparable. In aid of the district courts jurisdiction, a preliminary injunction was entirely in order as within the pendent jurisdiction of the courts.

Point V

PRELIMINARY INJUNCTION SHOULD BE AFFIRMED BECAUSE LIKELIHOOD OF SUCCESS ON THE MERITS AND IRREPARABLE INJURY, WERE DETERMINED BY THE DISTRICT COURT TO EXIST.

Judge Pratt was called upon in Judge Neaher's absence to maintain the status quo. In Birch v. Hirsch, the Court said that the trial court's failure to couch its findings and conclusion in a manner relating directly to the injunctive remedy granted did not constitute reversible error, 331 F.2d 251 (7th Cir. 1964). In Rowley v. McMillan, (see supra), the Court stated, that no recitation of a particular formula is required in an order granting preliminary injunctive relief; findings as to the necessary requirements for such relief may be implicit in the opinion. Also see Urbain v. Knoff Bros. Mfg. Co., 217 F.2d 810 (Ohio 1954) 75 S. Ct. 772, 349 U.S. 930 99 L.Ed. 1260. In the instant action, the district court disposed of the motions with this statement: "It is precisely this kind of delay against which plaintiffs complain in their action" (A24-25). The court went on and preliminarily enjoined the Service from continuing deportation proceedings. Counsel submits,

that the requisite findings required were implicit in this order.

The motion is addressed to the judicial discretion of the court. Ideal Toy Corp. v. Sayco Doll Corp. 302 F.2d 623 (2d Cir. 1962). The district court concluded, albeit implicitly, that there was a prima facie showing of likelihood of success on the merits - it was eight months since Ms. Small had applied for naturalization - and counsel submits that such delay and tangential deportation are legally sufficient as implicit findings in the trial courts status quo memorandum and order with respect to "injury" and "success on the merits."

Bearing in mind that the jurisdictional issue was still not settled, but deferred, and that the government had asked for continuances on all proceedings except the deportation proceeding (A8), the government has not made a clear showing in seeking to overturn the injunction, of abuse of discretion or clear error of law on the part of the trial judge. Roselli v. Afflick, 508 F.2d 1277 1st Cir. Finally, the facts of this particular action should allow the interim trial court to dispense with conventional requirements and fashion remedies, weighing the parties respective injuries. Youngstown Sheet and Tub Co. v. Lawyer, 103 F. Supp. 569, aff'd 343 U.S. 579 72 S. Ct. 863 (1952).

Conclusion

For the foregoing reasons, the orders of the district court should be affirmed in all respects.

Dated: New York, New York
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Respectfully submitted,

Leon Rosen, Attorney for Plaintiffs,

By; S. Bernard Schwarz, of Counsel

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